



Below is a Memorandum Decision of the Court.

Mary Jo Heston

**Mary Jo Heston
U.S. Bankruptcy Judge**

(Dated as of Entered on Docket date above)

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

In re:

INGRIM FAMILY LLC,

Debtor.

KATHRYN A. ELLIS, Trustee of the Estate of
Ingrim Family LLC,

Plaintiff,

v.

LEE and JANE DOE INGRIM, husband and
wife and the marital community composed
thereof,

Defendants.

Case No. 15-43036

Adversary No. 16-04052

**MEMORANDUM DECISION ON
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT ON REMAINING
CAUSES OF ACTION**

This matter came before the Court for hearing on August 16, 2018, on Plaintiff's Motion for Summary Judgment for Avoidance and Recovery of Fraudulent Transfer and Post-petition Transfer ("Motion"), filed by Kathryn Ellis, Trustee ("Trustee") of the Estate of Ingrim Family LLC ("Debtor"). The Court previously entered an Order on Motion for Summary Judgment for Avoidance and Recovery of Preferential Transfers on August 8, 2017 ("2017 Order"). The

**MEMORANDUM DECISION ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
ON REMAINING CAUSES OF ACTION - 1**

1 2017 Order grants the Trustee summary judgment on its cause of action for avoidance of
2 preferential transfers in the amount of \$7,000, which was subsequently enumerated as First
3 Cause of Action in the Plaintiff's First Amended Complaint for Avoidance and Recovery of
4 Preferential and Fraudulent Transfers Pursuant to 11 U.S.C. §§ 547(b)¹, 548, 549, 550 and
5 551 ("Amended Complaint"). The 2017 Order is currently on appeal to the Bankruptcy
6 Appellate Panel for the Ninth Circuit (BAP).² The Amended Complaint also asserts a Second
7 Cause of Action to avoid a fraudulent transfer of \$8,500 under § 548 and a Third Cause of
8 Action to avoid the transfer/disposition of a point of sale device and neon sign under § 549.
9 The Second and Third Causes of Action are the subject of the Trustee's Motion and
10 addressed in this Memorandum Decision.
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12 At the August 16, 2018 hearing, the Court determined that the Trustee established it
13 was entitled to summary judgment on the unopposed claim made pursuant to § 549(a) to
14 avoid the postpetition transfer/disposition of the point of sale device with the undisputed value
15 of \$5,000. Regarding the Trustee's unopposed claim to avoid the postpetition
16 transfer/disposition of a neon sign made pursuant to § 549(a), the Court determined that the
17 Trustee established the elements of the claim, but granted Lee and Jane Doe Ingram
18 ("Defendants") additional time to file objective evidence of the sign's value to overcome the
19 Debtor's scheduled value and 341 meeting testimony of the Debtor's principal that the sign
20 was worth \$7,000. The Trustee was granted time to respond. Regarding the Trustee's
21 undisputed claim to avoid the transfer of \$8,500 pursuant to § 548(a)(1), the Court determined
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24 ¹ Unless otherwise indicated, all chapter, section and rule references are to the Federal Bankruptcy Code,
25 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

² Oral argument of this appeal is scheduled before the BAP on October 25, 2018. BAP No. WW-17-1241-TaBKU.

1 that the Trustee established the elements of this claim except insolvency. The Court granted
2 the Trustee additional time to provide such evidence, with time for the Defendants to respond.
3 The Court incorporates by reference its oral ruling made at the August 16, 2018 hearing,
4 pursuant to Fed. R. Bank. P. 7052.

5 The Trustee timely filed an additional memorandum and evidence addressing
6 insolvency under § 548(a), to which the Defendants did not respond. The Defendants timely
7 filed additional information regarding the change in the sign's value from its earlier
8 represented value, to which the Trustee responded. Based on the evidence, arguments of
9 counsel, and pleadings submitted, the Court makes the following findings of fact and
10 conclusions of law.
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12 A. Fragile financial condition under § 548(a)(1)(B)(ii)

13 In the Trustee's Motion and at the August 16, 2018 hearing, the Trustee argued that
14 the Debtor was insolvent at the time it transferred \$8,500 to the Defendants, or became
15 insolvent as a result of the transfer, pursuant to § 548(a)(1)(B)(ii)(I). In the Supplemental
16 Memorandum Re: Insolvency in Support of Motion for Summary Judgment, the Trustee relies
17 on § 548(a)(1)(B)(ii)(III) to establish the last element for its claim under § 548(a)(1)(B). This
18 section requires a plaintiff to establish that the debtor "intended to incur, or believed that the
19 debtor would incur, debts that would be beyond the debtor's ability to pay as such debts
20 matured." "[C]ourts have held that the intent requirement can be inferred where the facts and
21 circumstances surrounding the transaction show that the debtor could not have reasonably
22 believed that it would be able to pay its debts as they matured." WRT Creditors Liquidation
23 Trust v. WRT Bankr. Litig. Master File Defs. (In re WRT Energy Corp.), 282 B.R. 343, 415
24 (Bankr. W.D. La. 2001).
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1 As with the other elements of this claim, the Defendants have presented no evidence
2 pertaining to the insolvency element opposing summary judgment. Even when the
3 nonmoving party fails to oppose, however, the burden remains with the moving party to prove
4 that it is entitled to the relief requested. Borough v. Rogstad (In re Rogstad), 126 F.3d 1224,
5 1227 (9th Cir.1997).

6 The Trustee has presented sufficient evidence that the Debtor could not have
7 reasonably believed that it would be able to pay its debts as they matured when the Debtor
8 transferred \$8,500 to the Defendants. The transfer at issue occurred on February 28, 2014.
9 According to the Debtor's federal tax return for 2013 (Form 1065 U.S. Return of Partnership
10 Income), the Debtor had an ordinary business loss of \$3,085 in 2013. Ellis Decl. Ex. 1, ECF
11 No. 120. Less than three months prior to the transfer, on November 1, 2013, the Debtor took
12 out a business loan of \$25,000 with Security State Bank. Id. Ex. 2. As part of that agreement,
13 Security State Bank was granted a security interest in "All Inventory and Equipment" of the
14 Debtor. Ellis Decl. Ex. 6, ECF No. 25. On February 7, 2014, the Debtor accessed the line of
15 credit up the maximum amount available. Ellis Decl. Ex. 4, ECF No. 120. According to the
16 check register for the Debtor's account at Anchor Bank, the Debtor's account was overdrawn
17 as of February 25, 2014, three days prior to the transfer. The Debtor's account was again
18 overdrawn on March 7, 21, April 12, 15-18, May 22-23, July 11, and 17, 2014, until another
19 loan was taken out by the Debtor in the amount of \$35,000 on July 24, 2014. Id. Ex. 5.

20 Furthermore, at the time of the transfer, the Debtor was delinquent in its payments to
21 the Washington State Liquor and Cannabis Board. According to audit findings by the
22 Washington State Liquor and Cannabis Board, the Debtor misreported for the 2nd Quarter
23 2012 through 1st Quarter 2014, resulting in total fees and penalties of \$22,569.61 due through
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1 the end of that quarter. Dotson Decl. 2:6-8, ECF No. 121. At the time of the transfer, the
2 Debtor also had an outstanding lease obligation through May 31, 2017, requiring a rental
3 payment of \$5,000 per month. See Ellis Decl. Ex. 5 at 27 ¶ 2.1, ECF No. 25. The Debtor was
4 unable to afford its lease obligation at least as of July 2014 and stopped making payments to
5 the Washington State Liquor and Cannabis Board in August 2014, with the last payment
6 made on August 6, 2014. Ellis Decl. Ex. 6 at 9, ECF No. 120; Dotson Decl. 4-5, ECF No. 121.

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8 Based on the admissible evidence before the Court, at the time of the transfer, all of
9 the Debtor's assets were encumbered by a loan with Security State Bank and the Debtor was
10 operating at a net loss. Additionally, the Debtor was delinquent on its taxes to the Washington
11 State Liquor and Cannabis Board, consistently overdrawn on its bank account, and struggling
12 to make a payment of \$5,000 per month on a lease with an outstanding obligation of at least
13 \$180,000. The Trustee has presented sufficient evidence to establish that as of the time of
14 the \$8,500 transfer to the Defendants, the Debtor could not have reasonably believed that it
15 would be able to pay its debts as they matured. The Trustee is entitled to summary judgment
16 avoiding the \$8,500 transfer pursuant to § 548(a)(1)(B).

17 B. Neon sign's value

18 Section 549(a) provides that a trustee "may avoid a transfer of property of the estate--
19 (1) that occurs after the commencement of the case; and . . . (2)(B) that is not authorized
20 under this title or by the court." It is undisputed that the sign was listed on the Debtor's
21 Schedule B as property of the estate. It is also undisputed that Defendant Lee Ingram
22 admitted in his deposition taken December 13, 2017, that he disposed of the sign postpetition.
23 See Ellis Decl. Ex. 4 at 33, ECF No. 112. Based on these undisputed facts, the Court
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1 determined at the August 16, 2018 hearing that the Trustee is entitled to summary judgment
2 avoiding the transfer of the neon sign pursuant to § 549.

3 Section 550 provides that the Trustee may therefore "recover, for the benefit of the
4 estate, the property transferred, or, if the court so orders, the value of such property" from the
5 Defendants. The Defendants admit that they disposed of the sign postpetition without court
6 authority. As the Trustee cannot recover the sign itself, the Trustee is entitled to a monetary
7 judgment for the value of the sign. See USAA Fed. Savs. Bank v. Thacker (In re Taylor), 599
8 F.3d 880, 890 (9th Cir. 2010) (purpose of § 550(a) is to restore the estate to the position it
9 would have occupied had the property not been transferred).

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11 When the value of property is recovered, as opposed to the property itself, the term
12 "value" refers to fair market value. Joseph v. Madray (In re Brun), 360 B.R. 669, 674 (Bankr.
13 C.D. Cal. 2007). At the August 16, 2018 hearing, the Court gave the Defendants additional
14 time to present objective evidence of the sign's value, including pictures, invoices, and
15 depreciation schedules. In response, the Defendants submitted the unsigned declaration of
16 Duane Taylor, alleging that the sign was a custom sign, rendering it of "no value, except as
17 scrap, to anyone else." Taylor Decl. 1:20-22, ECF No. 123. Defendant Lee Ingram also
18 submitted a supplemental declaration now alleging that he, rather than the Debtor, originally
19 purchased the sign, and attaching an invoice for a "sign deposit" of \$4,000. The sign,
20 however, remains listed on the Debtor's Schedule A/B as property of the estate, both in the
21 original schedules and unsigned amended schedules, which also attach a letter from Mr.
22 Taylor opining that the sign has no value except for scrap metal.

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24 The evidence presented by the Defendants is insufficient to create an issue of material
25 fact as to the value of the sign. A court can only consider admissible evidence in ruling on a

1 motion for summary judgment. Fed. R. Civ. P. 56(c); Beyene v. Coleman Sec. Servs., Inc.,
2 854 F.2d 1179, 1181 (9th Cir. 1988). The declaration of Mr. Taylor at ECF No. 123 is
3 unsigned and therefore cannot be considered. Regarding Mr. Taylor's prior declaration at
4 ECF No. 116, this also does not provide evidence from which a fair market value can be
5 determined. His two-sentence declaration merely states that he inspected the sign and that it
6 had no value except for scrap metal. Mr. Taylor's declaration does not provide his
7 qualifications to value the sign, the date of the inspection, or any sign specifications like size,
8 color, or material, or even what would constitute "scrap metal." In short, even taking all
9 inferences in the nonmoving party's favor, this declaration does not raise an issue of material
10 fact as to the sign's value. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

12 The same is true of the invoice attached to Lee Ingram's declaration. Taking all
13 inferences in the Defendants' favor, such invoice merely establishes that a sign was
14 purchased from a certain vendor in March 2011 and that a deposit of \$4,000 was paid. No
15 admissible evidence has been presented as to the total amount paid, nor was the purchased
16 sign described or identified.

17 The Defendants have failed to provide the Court with any admissible evidence from
18 which it can determine the "fair market value" of the sign. The only evidence before the Court
19 from which the value of the sign can be ascertained for purposes of § 550 are the Debtor's
20 schedules and the transcript of Defendant Jana Ingram's testimony at the 341 meeting of
21 creditors. According to Schedule B filed with the petition and signed by Ms. Ingram under
22 penalty of perjury as Managing Member of the Debtor, the value of the sign as of the petition
23 date was \$7,000. Ms. Ingram confirmed that value at the 341 meeting held July 28, 2015.
24 Ellis Decl. Ex. 1 at 6-7, ECF No. 125. Although the Debtor attempted to amend Schedules
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1 A/B to change the value of the sign to \$1 after the Trustee sought to avoid the transfer, these
2 schedules are not signed and will not be considered. See Rule 1008; Searles v. Riley (In re
3 Searles), 317 B.R. 368, 377 (9th Cir. BAP 2004) (schedules must be verified or contain an
4 unsworn declaration under penalty of perjury).

5 Furthermore, statements in bankruptcy schedules that are executed under penalty of
6 perjury, when offered against a debtor, are eligible as judicial admissions. In re Rolland, 317
7 B.R. 402, 421 (Bankr. C.D. Cal. 2004).

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9 "Judicial admissions are formal admissions in the pleadings which have the
10 effect of withdrawing a fact from issue and dispensing wholly with the need for
11 proof of the fact." Am Title Inc. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th
12 Cir. 1998) (quoting In re Fordson Eng'g Corp., 25 B.R. 506, 509 (Bankr. E.D.
13 Mich. 1982)). Judicial admissions are conclusively binding on the party who
made them. Am. Title Ins., 861 F.2d at 226; Fordson, 25 B.R. at 509. Even
when schedules are amended, the old schedules are subject to consideration by
the court as evidentiary admissions. Kaskel, 269 B.R. at 715; Bohrer, 266 B.R.
at 201.

14 Rolland, 317 B.R. at 421-22.

15 Here, the Defendants admit that they are insiders of the Debtor. Answer 1, ECF No.
16 105. Ms. Ingram testified that she read the schedules before signing them under penalty of
17 perjury, and the information contained in them was true. Ellis Decl., Ex. 1 at 6, ECF No. 125.
18 Schedule B places a value of \$7,000 on the sign, and the Defendants, who are insiders of the
19 Debtor and prepared the schedules, should be bound by the originally represented value
20 under the circumstances of this case. Additionally, despite the Court allowing the Defendants
21 additional time to provide objective evidence of value, the Defendants have not submitted any
22 admissible evidence contrary to the value listed in the schedules. Based on the record before
23 it, and taking all inferences in the Defendants' favor, the Court finds that the value of the sign
24 disposed of by the Defendants postpetition is \$7,000.
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1 C. Spoliation

2 The Trustee also raised spoliation as a means for binding the Defendants to the values
3 placed on the sign and point of sale device in the Debtor's bankruptcy schedules for purposes
4 of § 550. As set forth above, it was not necessary for the Court to rely on spoliation in
5 determining the value of either asset. However, the Trustee also asks this Court to find that
6 spoliation warrants an award of sanctions in this case, including attorney fees.

7 "Spoliation is the destruction or significant alteration of evidence, or the failure to
8 preserve property for another's use as evidence in pending or reasonably foreseeable
9 litigation." West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2nd Cir. 1999); Apple
10 Inc. v. Samsung Elecs. Co., 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012). In cases filed in
11 federal court, federal law governs the rules that apply to, and the range of sanctions a federal
12 court may impose for, the spoliation of evidence. Adkins v. Wolever, 554 F.3d 650, 652 (6th
13 Cir. 2009).

14 Federal courts have broad discretion in determining the appropriate sanction for the
15 spoliation of evidence. Adkins, 554 F.3d at 652. Sanctions a court may impose include
16 dismissing a case, granting summary judgment, and instructing a jury that it may make an
17 adverse inference against the spoliating party based on its spoliation of the evidence. Adkins,
18 554 F.3d at 653. The "determination of an appropriate sanction for spoliation 'is confined to
19 the sound discretion of the trial judge, and is assessed on a case-by-case basis.'" Reinsdorf
20 v. Skechers U.S.A., Inc., 296 F.R.D. 604, 626 (C.D. Cal. 2013) (quoting Fujitsu Ltd. v. Fed.
21 Express Corp., 247 F.3d 423, 436 (2d. Cir. 2001)).

22 It is undisputed that the Defendants disposed of the sign and point of sale device
23 postpetition. The bare fact that evidence has been altered or destroyed, however, "does not
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1 necessarily mean that the party has engaged in sanction-worthy spoliation.'" Reinsdorf, 296
2 F.R.D. at 626 (quoting Ashton v. Knight Transp., Inc., 772 F. Supp. 2d 772, 799-800 (N.D.
3 Tex. 2011)). While in the Ninth Circuit a party's destruction of evidence need not be in bad
4 faith to warrant sanctions, "'a party's motive or degree of fault in destroying evidence is
5 relevant to what sanction, if any, is imposed.'" Reinsdorf, 296 F.R.D. at 627 (quoting In re
6 Napster, Inc. Copyright Litigation, 462 F. Supp. 2d 1060, 1066-67 (N.D. Cal. 2006)). In
7 determining whether to impose sanctions for the destruction of evidence, courts apply the
8 following three-part test:

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10 A party seeking an adverse inference instruction (or other sanctions) based on
11 the spoliation of evidence must establish the following three elements: (1) that
12 the party having control over the evidence had an obligation to preserve it at the
13 time it was destroyed; (2) that the records were destroyed with a "culpable state
of mind" and (3) that the evidence was "relevant" to the party's claim or defense
such that a reasonable trier of fact could find that it would support that claim or
defense.

14 Reinsdorf, 296 F.R.D. at 626 (quoting Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220
15 (S.D.N.Y. 2003)).

16 The Trustee has not established the necessary culpable state of mind in disposing of
17 estate assets that would warrant the imposition of sanctions in this case. In Mr. Ingram's
18 Declaration filed in response to the Motion, the Defendant stated that he stored the sign for 36
19 months, the Trustee did not inquire about the sign until 2018, and he believed the sign
20 became his after expiration of the lease with the Debtor. Resp. Ex. 1, ECF No. 116. Mr.
21 Ingram stated in his deposition that the point of sales device was similarly held and then
22 eventually thrown away. Ellis Decl. Ex. 4 at 33, ECF No. 112. Although the disposition of
23 these assets postpetition were unauthorized, the Bankruptcy Code allows the Trustee to avoid
24 the transfers under § 549 and obtain a monetary judgment under § 550 for their value. The
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1 evidence does not establish that the Defendants' actions rise to the level of sanctionable
2 conduct warranting an additional judgment against the Defendants for the Plaintiff's attorneys
3 fees. For similar reasons, the Court also disagrees with the Plaintiff that an award of fees is
4 warranted under the Court's inherent authority under § 105.

5 Accordingly, the Trustee's Motion for Summary Judgment is granted as to the Trustee's
6 claim under § 548 to avoid the transfer of \$8,500 made on February 28, 2014. The Trustee's
7 Motion for Summary Judgment is also granted as to the Trustee's claims under § 549 to avoid
8 the transfers/disposition of the point of sale device and the neon sign and to recover the value
9 of the point of sale device in the amount of \$5,000 and \$7,000 for the sign under § 550. The
10 Trustee's motion for sanctions is denied.
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12 ///End of Memorandum Decision///
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